JD(ATL)–19–04
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

MARC GLASSMAN, INC.

and Case 8–CA–34205

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 880, AFL-CIO, CLC

Iva Y. Choe, Esq., for the General Counsel.
Maria L. Petrillo and *Robert C. Nagle, Esqs.*, for the Respondent.
Mr. Louis J. Maholic, for the Charging Party.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Cleveland, Ohio, on February 4, 2004, pursuant to a consolidated complaint that issued in Cases 8–CA–34205 and 8–CA–34483 on November 26, 2003.[1] Prior to the opening of the hearing, the parties settled Case 8–CA–34483 and, at the hearing, I granted the motion of Counsel for the General Counsel to sever that case. The caption herein reflects the only case before me, Case 8–CA–34205. The charge in that case was filed on April 25 and was amended on September 25 and October 23. The complaint alleges that Respondent engaged in surveillance in violation of Section 8(a)(1) of the National Labor Relations Act. The Respondent's timely answer denies any violation of the Act. At the hearing, the Respondent moved to dismiss the complaint because there was no evidence of surveillance of any employees of the Respondent. I denied the motion, noting that, under the Act, the term employee is broader than the employees of a specific employer. If I had granted the motion, I would have effectively been issuing a bench decision. See *Technology Service Solutions*, 332 NLRB 1096, at fn. 3 (2000). At the time I denied the motion, I pointed out that the Respondent might well receive a favorable decision upon citation of authority supporting the foregoing argument in its brief. I find that the Respondent did not violate the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, Marc Glassman, Inc., the Company, is an Ohio corporation engaged in the retail sale of groceries and general merchandise at various facilities including its store at Austintown, Ohio. The Respondent annually derives gross revenues in excess of $500,000 and

[1] All dates are in 2003 unless otherwise indicated.

annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, at the hearing, admitted, and I find and conclude, that United Food and Commercial Workers Union, Local No. 880, AFL-CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Company's retail stores are identified as "Marc's." In early 2003, the Company opened new stores including one at Boardman, Ohio, and another at Austintown, the location involved in this proceeding, which opened on April 1. In late March, the Union was engaged in an organizational campaign at the Company's store located at Mayfield and Green Road, near Cleveland, Ohio. On March 20, AFL-CIO President John Sweeney and between 30 and 40 supporters of the Union entered the Marc's store at Mayfield and Green Road in a group and then dispersed and began distributing prounion fliers and engaging employees in conversation. Store Manager David Zavatchen testified that the influx of individuals at that store was disruptive, noting that in addition to talking and distributing fliers, the individuals bought only insignificant items, such as chewing gum, but then engaged the cashiers in conversation. Managers, including Donald Hamilton, Store Manager of the newly opened Austintown store, referred to this incident as a "storming" or "invasion" of the Mayfield and Green Road store.

Beginning two days before the opening of the Marc's store in Austintown, the Union began engaging in informational picketing at the store. Typically there would be 8 to 10 pickets at the four entrances to the parking lot of the Austintown store. There is no evidence that any Marc's employee engaged in this picketing. The only employee who testified in this proceeding, union member Catherine Carlson, is an employee of Giant Eagle, a unionized retail store that sells products similar to those sold at Marc's. The Union was also picketing at the newly opened store in Boardman. Several days prior to April 12, the Union distributed fliers promoting a "rally" on that date at the Boardman and Austintown stores. The Company heard of the Union's plans. A rally differed from the day-to-day picketing in that a larger number of union members as well as representatives of other unions joined in the informational picketing at the two stores, neither of which was organized by the Union. All of the picketing occurred on public property.

B. Facts

On the morning of April 12, union member Catherine Carlson arrived at the Austintown store and, as she had for the prior two weeks, engaged in informational picketing with several other union members. About 8:30 a.m., additional union members and representatives of other unions began arriving. Union Representative Michael Krzys, who arrived at the site between 8 and 8:30 a.m. to coordinate the rally, sought to assure that no union members parked in the Marc's parking lot, explaining that "if we saw them heading for the Marc's parking lot [we told them] to immediately move their cars across the street."

Immediately prior to the rally, about 9:30 a.m., Union Representative Krzys addressed those who had come to participate in the rally, a total of about 50 individuals, that included members of the Union (UFCW Local 880) and representatives from the Teamsters Union, Iron Workers Union, and Auto Workers Union, in the parking lot of an adjacent business where the Union had received permission to gather. Krzys explained to the participants in the rally that

they were not to block any entrance and "to be peaceful the whole time." Carlson recalls that Krzys told the participants that they would be given signs and that they should then pick a location, referring to a location on the public right-of-way, and "walk back and forth." He told them not to be "rude or vulgar or loud or volatile, and just enjoy each other's company."

After the rally began, Union Representative Krzys observed Store Manger Donald Hamilton in the Marc's parking lot with a video camera. Although Hamilton testified that he was accompanied only by District Manager Jeff Pressley, Krzys recalls observing that he was accompanied by more than one other person and that the other individuals had "pads and paper" and appeared to be writing down license plate numbers."

Union member Carlson recalled that the rally began on schedule, at 10 a.m. Shortly after it began, she noticed three men, two of whom were wearing suits, walking from the store towards the rally. The man who was not wearing a suit was carrying a video camera. That individual "was panning back and forth … with the video camera." She then observed that the two individuals wearing suits appeared to be writing down the license plates of vehicles parked in the Marc's store parking lot on tablets that they were carrying. When they had finished doing this, the man with the video camera, who had stopped panning back and forth, raised the camera and panned back and forth again. Carlson ceased to observe the three individuals when they began walking to another area of the parking lot.

Store Manager Hamilton acknowledges videotaping. He testified that only one other individual, District Manager Jeff Pressley, accompanied him. Pressley did not testify. Hamilton denied being aware that any Company representative wrote down license plate numbers, but admitted videotaping at least six and possibly 10 license plates. He explained that, because the parking lot was comparatively small for a Marc's store, the Company had, prior to the opening of the store on April 1, made arrangements for employees to park at a nearby car dealership and restricted parking in the lot to customers. Because of this restriction, if union members had parked in the Marc's lot, they would have trespassed, and the Company needed "to have the proof that they were parking on the lot." In this regard, Hamilton noted that he was aware that the Company had filed a charge relating to the picketing.[2]

Hamilton testified that he began to videotape between 9:15 and 9:30, but if that were correct it would have been prior to the rally which began at 10 a.m. Regardless of when he began taping, Hamilton acknowledges that he was in the parking lot throughout the entire rally and that, during that period, he did videotape at different times for a total of approximately 25 minutes. He testified that, after the rally participants were in position, he observed some participants cross the entrances to the parking lot and that this disrupted traffic. Insofar as he had begun videotaping either as the rally began or immediately prior to it, his videotaping was not in response to this conduct that he testified that he observed.

After he began to videotape, Hamilton received a telephone call from Regional Manager Mike Shoemaker, who was at the Boardman store. Shoemaker reported that there were approximately 100 people at that store and that they had inflated a huge rat. About a half hour later, Shoemaker called Hamilton again and reported that the participants in the rally at Boardman had "stormed the store, that it was very chaotic," that managers had attempted to deny entry to the rally participants but had not been successful, and that he was concerned that "the same thing might happen at Austintown." About a half hour after this call, Hamilton received another call from Shoemaker who reported that it was rumored that the "picketers were being

[2] That charge, filed on April 1 and withdrawn on April 25, has no relevance to this proceeding.

bussed to Austintown." Hamilton acknowledged that the rumor proved to be false and that the rally at Austintown concluded without incident.

Hamilton was not the only individual recording the rally. Krzys recalls that a film crew, apparently with the permission of the Union or on behalf of the Union, was "interviewing people out on a sidewalk that day."

When questioned by Union Representative Louis Maholic, who appeared as the representative of the Charging Party, Store Manager Hamilton admitted that he did not know each and every employee of Marc's, implying that a Marc's employee may have been present at the rally. There is, however, no evidence that any Marc's employee was present.

C. Analysis and Concluding Findings

The charge, as amended, alleges that the Respondent engaged "in unlawful surveillance of employees' protected activities." The complaint, in two separate subparagraphs, alleges that the Respondent "videotaped a union rally conducted on public property in front of Respondent's Austintown, Ohio, retail store" and that the Respondent "recorded license plate numbers of vehicles parked adjacent to the location of the rally … or gave the appearance that they were recording such information."

The General Counsel, while not disputing that no employee of the Respondent was videotaped or aware of the videotaping, argues that Store Manager Hamilton had no "objective basis … to believe that any misconduct would occur" at the time that he began videotaping, and that "a reasonable inference can be made" that the Respondent's employees would learn of the videotaping.

The Respondent argues that there was no unlawful surveillance as a matter of law because no employees of the Respondent were videotaped and there is no evidence that any of the Respondent's employees were aware of the videotaping. The Respondent further argues that it had "a reasonable basis for anticipating misconduct" in view of the incident at the Mayfield and Green Road store in March, the daily picketing at the Austintown store, and what actually occurred during the rally at the Boardman store.

I disagree with the Respondent's argument insofar as it relates to Hamilton's initial videotaping. At the time Hamilton began videotaping he had not observed any misconduct at the Austintown store. It is arguable that he had a reasonable basis for anticipating misconduct after he received the telephone call from Regional Manager Shoemaker regarding the disruption caused by the inflation of the giant rat at Boardman, but he did not receive that call until after he had begun videotaping. Anticipatory photographing of employees because of a belief that "something 'might' happen" is an insufficient justification for interference with employees' protected conduct. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). In *F. W. Woolworth Co.*, employees of the respondent were being photographed and that conduct was found to have interfered with their protected conduct in violation of Section 8(a)(1) of the Act.

In the instant case, there is no evidence of any interference with protected conduct of employees of the Respondent. There is no evidence that any employee of the Respondent was involved in the rally or was aware of the videotaping. The General Counsel, citing *John Ascuaga's Nugget*, 298 NLRB 524 (1990) and *Holly Farms Poultry Industries, Inc.*, 186 NLRB 210 (1970) argues that "a reasonable inference can be made that employees would learn of an employer's photographing." Neither of the foregoing cases stands for that proposition. The Board, in *John Ascuaga's Nugget*, did not rule upon "the judge's finding [regarding] …

photographing nonemployee prounion picketers on public property." Id. at fn. 3. In *Holly Farms*, the Board predicated its affirmance of the judge's decision regarding the surveillance allegation upon the "alternative finding that this incident occurred in the presence of employees." Id. at fn. 1. In *Alle-Kiski Medical Center*, 339 NLRB No. 44 (2003), also cited by the General Counsel, the surveillance occurred in the presence of that respondent's employees and the employees themselves were observed as they received union literature.

At the time Hamilton began videotaping, and at all times thereafter, he was in the Marc's parking lot videotaping the activities of approximately 50 individuals, none of whom were identified as employees of the Respondent. He acknowledged also videotaping the license plates of as many as 10 vehicles that were in the parking lot. Employees of the Austintown store had been directed to park at locations other than the lot in front of the store to assure that there was sufficient customer parking, and Union Representative Krzys had sought to assure that no picketers parked in the lot of the Austintown store. There is no evidence that any vehicle in the Respondent's parking lot belonged to a Marc's employee or to a rally participant. The lot was reserved for customers. A company's recording of the license plates of its customers' vehicles does not violate the Act.

In *Dayton Hudson Corp.*, 316 NLRB 477 (1995), the respondent argued that the administrative law judge erred in finding that unlawful surveillance had occurred when employees were only incidentally videotaped "during lawful surveillance of nonemployees." Id. at fn. 1. The Board determined that the record established numerous instances in which videotaping of employee movements had occurred when union organizers were not present, and it, therefore, did not need to determine whether there was a violation when the taping of employees "was merely incidental to lawful surveillance of nonemployees." Ibid. The decision, by referring to the "lawful surveillance of nonemployees," implies that such surveillance, standing alone, does not violate the Act.

The foregoing implication, that surveillance of nonemployees standing alone does not violate that Act, was confirmed in *St. Mary's Hospital*, 316 NLRB 947 (1995), cited by the Respondent in its brief. In that case the Board overruled the finding of the administrative law judge and held that the respondent therein had not created an impression of surveillance because the only surveillance that had occurred was of nonemployee union organizers who had been asked to leave the visitors' entrance to the hospital and had thereafter been surveilled as they handbilled on a public sidewalk. The Board reasoned that there could have been no impression of surveillance since there was no evidence that the Respondent's surveillance was "directed at any of its employees" or was "observed by any of its employees." Ibid.

There is no evidence that any employee of the Respondent participated in the rally at the Austintown store on April 12. It was incumbent upon the General Counsel to establish that there were one or more employees of the Respondent among the 50 individuals participating in the rally in order to establish that the Respondent engaged in surveillance of its employees. So far as this record shows, the participants consisted of members of Local 880 and representatives of the Teamsters, Iron Workers, and UAW.

There is no evidence that any employee of the Respondent was aware of the videotaping in which Hamilton engaged.

As in *St. Mary's Hospital*, there is no evidence that the surveillance in which the Respondent engaged was "directed at any of its employees" or was "observed by any of its employees." I shall recommend that the complaint be dismissed.

Conclusions of Law

The Respondent has not violated Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 26, 2004

George Carson II
Administrative Law Judge

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.